

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION**

NO. 5:10-CV-546-BO

APOSTLE ANTHONY L. McNAIR,)

Plaintiff,)

v.)

**MEMORANDUM AND
RECOMMENDATION**

ROCKY MOUNT DISTRICT)
ATTORNEY'S OFFICE ,)

Defendant.)

_____)

Plaintiff has filed an application to proceed *in forma pauperis*, and has demonstrated appropriate evidence of inability to pay the required court costs. However, the Court must also conduct a review pursuant to 28 U.S.C. § 1915(e)(2) which requires the Court to dismiss all or any part of an action found to be frivolous or malicious, which fails to state a claim upon which relief can be granted, or which seeks money damages from a defendant immune from such recovery. See Cochran v. Morris, 73 F.3d 1310, 1315-16 (4th Cir. 1996)(discussing *sua sponte* dismissal under predecessor statute 28 U.S.C. § 1915(d)). A case is frivolous if it lacks an arguable basis in either law or fact. See Neitzke v. Williams, 490 U.S. 319, 325 (1989). For the following reasons the undersigned recommends that Plaintiff's Complaint be found insufficient to survive review under 28 U.S.C. § 1915(e)(2).

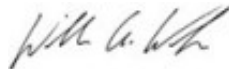
As an initial matter, the undersigned notes makes few specific allegations regarding the named defendant in this matter, and thus his Complaint could be deemed frivolous for that reason alone. Moreover, Plaintiff purports that his claim is being filed pursuant to 42

U.S.C. § 1983. However, “in initiating a prosecution and in presenting the State’s case, the prosecutor is immune from a civil suit under § 1983.” Imbler v. Pachtman, 424 U.S. 409, 431 (1976). *See also*, Smith v. McCarthy, 349 Fed. Appx. 851, 859 (4th Cir. 2009). Although Plaintiff’s Complaint is vague, it is clear that Defendant is protected by absolute immunity with regard to these claims. Finally, Plaintiff requests that his “convictions be overturned” (DE 1-3, pg. 4). Actions attacking the validity of the fact or length of confinement are not cognizable under 42 U.S.C. § 1983. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973).

Conclusion

For the aforementioned reasons, the undersigned RECOMMENDS that Plaintiff’s motion to proceed *in forma pauperis* be GRANTED, but that his Complaint be dismissed for failure to state a claim.

SO RECOMMENDED in Chambers at Raleigh, North Carolina this 6th day of December, 2010.



WILLIAM A. WEBB
UNITED STATES MAGISTRATE JUDGE